Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya'kub

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q–02–434 OF 1996
DENIS ONG, MOHD GHAZALI AND HASHIM YUSOFF JJCA
11 MARCH 2005

Tort — Defamation — Defence — Fair comment — Publication of defamatory letter in newspaper — Whether appellants could prove publication was fair comment on balance of probabilities

Tort — Defamation — Defence — Justification — Publication of defamatory letter in newspaper — Whether appellants could prove truth of defamatory imputations on balance of probabilities

Tort — Defamation — Defence — Qualified privilege — Publication of defamatory letter in newspaper during state by-election — Whether appellants could prove qualified privilege on balance of probabilities — Whether publication was privileged as by-election generated public interest

Tort — Defamation — Libel — Publication of defamatory letter in newspaper — Whether letter defamatory of respondent — Whether letter calculated to expose respondent to hatred, ridicule or contempt in mind of reasonable man or lower him in estimation of right-thinking members of society

The respondent filed a claim against the appellants for damages as well as for an injunction and costs for libel contained in an article appearing in a daily newspaper in Sarawak ('the said article'). The said article concerned a letter to the third defendant as the editor of the newspaper regarding a state constituency by-election where the respondent accompanied an independent candidate to the nomination centre on the nomination day. After a full trial, the High Court found in favour of the respondent and awarded the sum of RM100,000 against the appellants as compensatory damages together with interest at 8% per annum from date of judgment until full payment as well as an order for injunction and costs. The appellant appealed to the Court of Appeal and contended that the words complained of in the said article were not defamatory of the respondent. The appellants further argued that even if such words were defamatory of the respondent, they could rely on the defences of justification, fair comment and qualified privilege.

Held, dismissing the appeal:

(1) The said article clearly stated the meaning of the allegations and imputations of the words complained of. The High Court had adopted the correct test, ie whether the words complained of were calculated to expose the respondent to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the respondent in the estimation of right thinking members of society generally (see para 10); *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334; *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 followed.

(2) The respondent had relied on imputations couched in specific terms or charges of wrong-doing that could be concluded from the said article. The appellants did not suggest any alternative imputations that could arise from the said article. The burden was therefore on the appellants to establish the truth of those specific charges or imputations bearing in mind s 8 of the Defamation Act 1957 (see para 17). On a balance of probabilities, the appellants had failed to establish the truth of the material statements in the words complained of in the said article and therefore their defence of justification failed (see para 18).

(3) The High Court held that it was unable to find that the words complained of in the said article were capable of being fair comments (see para 20). It is now the well-settled rule that in a finding of 'libel' or 'no libel', the appellate court would rarely interfere because, this was due to the difficulty of applying the principle to a finding that was to a considerable extent, a matter of opinion (see para 22); *Odger v Matimer* (1872) 28 LT 472 followed.

(4) On the balance of probabilities the defence of qualified privilege failed because the said article was not specifically pleaded to be a report on the by-election and that it was confined to the voters of the constituency. Moreover, the respondent was not even a candidate for the by-election (see para 15).

[**Bahasa Malaysia summary**

Responden telah memfailkan satu tuntutan terhadap perayu-perayu untuk ganti rugi dan juga untuk satu injunksi dan kos kerana libel yang terkandung dalam artikel sebuah akhbar harian di Sarawak ('artikel tersebut'). Artikel tersebut berkaitan sepucuk surat kepada defendan ketiga sebagai editor akhbar berhubung pilihan raya kerajaan negeri di mana responden telah menemani seorang calon bebas ke pusat undian pada hari undian tersebut. Selepas perbicaraan penuh, Mahkamah Tinggi menyebelahi pihak responden dan mengawardkan sejumlah RM100,000 terhadap perayu-perayu sebagai ganti rugi pampasan berserta faedah pada kadar 8% setahun dari tarikh penghakiman sehingga bayaran penuh dan juga satu perintah untuk injunksi dan kos. Perayu telah merayu ke Mahkamah Rayuan dan menegaskan bahawa perkataan-perkataan yang diadukan dalam artikel tersebut tidak memfitnah responden. Perayu-perayu seterusnya berhujah bahawa jika perkataan-perkataan sedemikian memfitnah responden, mereka boleh bergantung kepada pembelaan justifikasi, komen adil dan perlindungan bersyarat.

Diputuskan, menolak rayuan tersebut:

(1) Artikel tersebut dengan jelas menyatakan maksud pengataan dan andaian perkataan-perkataan yang diadukan. Mahkamah Tinggi telah menggunakan ujian yang betul, iaitu sama ada perkataan-perkataan yang diadukan

dianggap sebagai mendedahkan responden kepada rasa benci, malu atau hina dalam pemikiran seseorang yang waras atau mungkin menjatuhkan maruah responden dalam pemikiran masyarakat secara umum (lihat perenggan 10); *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334; *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 diikut.

(2) Responden bergantung kepada pengataan dalam istilah atau penuduhan spesifik yang boleh disimpulkan daripada artikel tersebut. Perayu-perayu tidak mencadangkan apa-apa pengataan alternatif yang mungkin timbul dari artikel tersebut. Beban terletak ke atas perayu-perayu untuk membuktikan kebenaran penuduhan atau pengataan spesifik tersebut menurut s 8 Akta Fitnah 1957 (lihat perenggan 17). Berdasarkan imbangan kebarangkalian, perayu-perayu gagal untuk membuktikan kebenaran pernyataan-pernyataan penting berdasarkan perkataan-perkataan yang diadukan dalam artikel tersebut dan oleh itu pembelaan justifikasi mereka gagal (lihat perenggan 18).

(3) Mahkamah Tinggi memutuskan bahawa ia tidak mendapati perkataan-perkataan yang diadukan dalam artikel tersebut sebagai komen yang adil (lihat perenggan 20). Adalah rukun yang tetap bahawa dalam satu penemuan 'libel' atau 'no libel', Mahkamah Rayuan jarang campur tangan kerana kesukaran menggunapakai prinsip ke atas suatu penemuan yang sebahagian besar daripadanya adalah berdasarkan suatu pendapat sahaja (lihat perenggan 22); *Odger v Matimer* (1872) 28 LT 472 diikut.

(4) Atas imbangan kebarangkalian pembelaan perlindungan bersyarat gagal kerana artikel tersebut tidak khusus diplidkan sebagai satu laporan pilihan raya kecil dan terhad kepada pengundi-pengundi bahagian pilihan raya. Tambahan pula, responden bukan seorang calon untuk pilihan raya kecil ini (lihat perenggan 15).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 314–434.

For cases on fair comment, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 289–293.

For cases on justification, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 309–312.

For cases on defences for defamation, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 267–273.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142 (refd)

Blackshaw v Lord [1983] 2 All ER 311 (refd)

Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [2001] 2 MLJ 65 (refd)

JB Jeyaretnam v Goh Chok Tong [1985] 1 MLJ 334 (folld)
Lange v Australian Broadcasting Corp [1997] 189 CLR 520 (refd)
Lee Kuan Yew v JB Jeyaretnam [1979] 1 MLJ 281 (refd)
Odger v Matimer (1872) 28 LT 472 (folld)
Reynolds v Times Newspaper [1999] 4 All ER 609 (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173 (refd)
Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 (folld)

Legislation referred to

Defamation Act 1957 ss 8, 12

Appeal from: Suit No KG 400 of 1986 (High Court, Kuching)

Sim Hui Chuang (Reddi & Co) for the appellants.
Chong Siew Chiang (Cheng Hui Hang with him) (Cheng & Cheng) for the respondent.

Hashim Yusoff JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned High Court judge in Kuching given on 28 of February 1995. We heard this appeal and reserved our judgment to be given at a later date. We now give our judgment.

FACTS OF THE CASE

[2] The respondent (the plaintiff in the court below) filed a claim against the appellants (the defendants in the court below) for damages as well as for an injunction and costs for libel contained in an article (exh P1 A) appearing in a daily newspaper in Sarawak called The People's Mirror published on 22June 1986 (hereinafter referred to as 'the said article'). The said article was featured as follows:

> Why stoop so low to scoop so little.
>
> Dear Editor,
>
> The Nomination Day for the Oya, N 32 on 17 June was a very colourful and memorable one.
>
> I was there and it was indeed a rich experience.
>
> I have never seen the commitment to the Barisan Nasional by the people of Batang Oya as open as it was demonstrated on 17 June 1986.
>
> It was indeed a sad day for Tun Rahman to be openly seen supporting and leading a group which is bent on trying to destroy the unity of the people of Batang Oya.

The people have rightly given him an appropriate reception by totally ignoring his presence there.

This must have been a big blow to his ego and indeed a great humiliation to the man who was once held in high respect when he was the Chief Minister and the Head of State.

How could he stoop so low?

What is the basis for accusing the Barisan Nasional and Datuk Patinggi Taib of splitting the people and creating hatred and bitterness between the Melanaus of Batang Oya.

Doesn't he realise that it was Datuk Haji Salleh and his cronies supported by Tun himself, who started the circus which later turned into a serious political confrontation.

Today, this very group of people are turning the people of Batang Oya into political tools for the sole purpose of gaining power.

Their sole and ultimate purpose is to gain power because only through the exercise of power one can control the riches and resources of Sarawak.

As a voter in Oya, N 32, I publicly declare that I will vote for the Barisan Nasional because it would be totally useless to vote for the independent candidate who has no means to deliver the goods.

I hope and urged other voters in the Oya Constituency to reject Datuk Haji Salleh so that the issue will be settled once and for all.

A Voter of Oya N 32

[3] After a full trial, the learned judge found in favour of the respondent and awarded the sum of RM100,000 against the appellants as compensatory damages together with interest at 8% per annum from date of judgment until full payment as well as an order for injunction and costs. Hence, this appeal by the appellants.

[4] Learned counsel for the appellants, in his submission raised several issues which can be summarised as follows:

(i) that the words complained of do not bear the pleaded meaning(s) ie not defamatory;

(ii) that if the words complained of are defamatory, the occasion on which the same were published without malice was of qualified privilege;

(iii) justification;

(iv) fair comment.

[5] Before going into the meanings of the words complained of, it is pertinent to know the background of the parties referred to therein. The respondent

was the chief minister of Sarawak from 1970 until his resignation in 1981. Thereafter he became the head of state for Sarawak from 1981 until 1985.

[6] There was a by-election for the state constituency of Oya after Datuk Hj Salleh Jaffaruddin ('Datuk Salleh') resigned as assemblyman for Oya. Datuk Salleh re-contested in the by-election as an independent candidate against the Barisan Nasional candidate Wan Madzihi Mahdzar ('Wan Madzihi'). Both candidates are the relatives of the respondent. The chief minister of Sarawak, Datuk Patinggi Hj Abdul Taib bin Mahmud is a nephew of the respondent. The respondent supported Datuk Salleh, while the chief minister supported Wan Madzihi in the said by-election.

[7] On nomination day, at the nomination centre the respondent was with Datuk Salleh leading a crowd of supporters while the chief minister, members of his cabinet and federal ministers were also present to support and campaign for Wan Madzihi. There was a lot of shouting and booing by supporters on both sides who gathered at the nomination centre.

WHETHER THE WORDS COMPLAINED OF ARE DEFAMATORY

[8] Coming to the issue whether the words complained of in particular, those paragraphs which specifically made reference to the respondent were defamatory or not, the learned judge said:

> … it is my finding in law that the words complained of were capable of being defamatory and were in fact defamatory of the plaintiff and of him in the way that was ascribed by him in para 4 of the statement of claim. The sting lay in the allegations and implications that the plaintiff acted in a way to divide the people of Batang Oya and using them as his political vehicle to gain power so that he could control the wealth of Sarawak for himself. To put it briefly, the words complained of alleged and implied that the plaintiff was unscrupulous, dishonourable, ruthless, selfish and greedy for power and wealth. With such allegations or implications no reasonable man would have found the words complained of to be anything else other than being defamatory of the plaintiff.

[9] Learned counsel for the appellants submitted that although the learned judge said in his judgment that the article was capable of the injurious imputation meaning, he did not say which meaning it was. On this point we are unable to agree with the said submission. The paragraph we referred to above clearly states the meaning of the allegations and imputations of the words complained of as found by the learned judge.

[10] In coming to his findings we are of the opinion that the learned judge had adopted the correct test ie whether the words complained of were calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right thinking members of society generally. (See *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334; *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 at p 58 D (right).)

QUALIFIED PRIVILEGE

[11] Learned counsel for the appellants in his written submission argued that even if the words complained of were defamatory, the occasion on which the same were published was without malice and of qualified privilege. He referred to the case of *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [2001] 2 MLJ 65 in which Mohamed Dzaiddin CJ *inter alia* stated at p 69 para B that 'In fact, the correct authority on qualified privilege in the context of the respondent's defence is *Lange v Australian Broadcasting Corp* [1997] 189 CLR 520 and not *Lange v Atkinson'*.

[12] It was further argued that the words complained of ie the letter to the editor was published on 22 June 1986. This was about five days after nomination day of the by-election. The words complained of, read as a whole, concerned an on-going by-election and the respective support of the two opposing sides. The words complained of therefore concerned politics and discussion of political matters. The political discussion was about the allegations of disunity, animosity and hatred, and the fight for power. In *Reynolds v Times Newspaper* [1999] 4 All ER 609 Lord Nicholls at p 626 paras g–h said:

> The court should be slow to conclude that a publication was not in the public interest and therefore the public had a right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.

[13] In reply, counsel for the respondent submitted that the appellants had relied on the conventional/traditional qualified privilege, that there was a duty to communicate to the public and the other party had an interest to receive.

[14] In his judgment, the learned judge had considered this issue of qualified privilege and found as follows:

> In all, DW5 only emphasised that the by-election had generated great public interest. But a matter of public interest does not necessarily entitle anyone to assume a duty to communicate it to others especially if any statement to that matter may be libellous.

[15] In our judgment we agree with the learned judge's finding that on the balance of probabilities the defence of qualified privilege fails in this instant appeal because the said article was not specifically pleaded to be a report on the by-election and that it was confined to the voters of the Oya constituency and moreover, the respondent was not even a candidate for the by-election. As stated by Stephenson LJ at p 327 in *Blackshaw v Lord* [1983] 2 All ER 311, 'Public interest and public benefit are necessary but not enough without more. There must be a duty to publish to the public at large and an interest in the public at large to receive the publication; and a section of the public is not enough' Even learned counsel for the appellants had conceded that there is no media privilege under the common law. He also conceded in the court below that the appellants were neither relying on s 12 of the Defamation Act 1957.

[16] Learned counsel for the appellants also submitted that the learned judge had erred in finding that the words complained of were published maliciously as there was no basis for the finding of express malice. On this issue, we agree with the learned counsel for the respondent that it was not pleaded as one of the grounds of appeal and therefore should be disregarded. In any event, even if it were to be considered, we could find nothing wrong with the learned judge's finding that there was express malice on the part of the appellants (see *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 or by inference (see *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142).

JUSTIFICATION

[17] Learned counsel for the appellants submitted that the words complained of were not capable of bearing and did not in fact bear the meanings pleaded in para 4 of the statement of claim. In his judgment the learned judge found that the respondent had relied on imputations couched in specific terms or charges of wrong-doing that could be concluded from the words complained of. His Lordship also noted that the appellants did not suggest any alternative imputations that could arise from the said words in the said article. The burden was therefore on the appellants to establish the truth of those specific charges or imputations bearing in mind s 8 of the Defamation Act 1957.

[18] In his judgment, the learned judge found that there was no evidence adduced that the respondent had strong ties with the local communities of the Oya constituency or that the by-election was a proxy battle between the respondent and Datuk Patinggi Hj Abdul Taib Mahmud, the chief minister of Sarawak. Nor did anyone testify that the situation during nomination day was tense. Further it was the witnesses for the appellants who had testified that a concert was even held during the campaigning period. The learned judge also found that none of the appellants' witnesses could say as a fact that the by-election was a test of political strength between the respondent and the chief minister. His Lordship therefore held on a balance of probabilities that the appellants failed to establish the truth of the material statements in the words complained of and therefore their defence of justification failed. We see no reason to disagree with the learned judge's findings on this issue for the reasons as stated above.

FAIR COMMENT

[19] It was submitted by learned counsel for the appellants that the subject matter was the by-election, whereby the role of the respondent, the candidate Datuk Salleh and his group and what they were trying to achieve was indicated with sufficient clarity to justify comment being made.

[20] The learned judge had however in his judgment, said that he was unable to find that the words complained of were capable of being comments. His

Lordship was of the view that the said article contained certain assertion of facts defamatory of the respondent and nothing has been shown by the appellants to the contrary.

[21] We agree with the learned judge's findings as it is settled law that a comment is a statement of opinion on facts truly stated. A libellous statement of fact is not a comment or criticism on anything (see *Lee Kuan Yew v JB Jeyaretnam* [1979] 1 MLJ 281).

[22] It is now the well-settled rule that in a finding of 'libel' or 'no libel', the appellate court would rarely interfere because, this is due to the difficulty of applying the principle to a finding that is to a considerable extent, a matter of opinion. (See Gately on *Libel & Slande*r 9th Ed Paras 36.19; *Odger v Matimer* (1872) 28 LT 472).

THE AWARD

[23] Regarding the award, learned counsel for the appellants did not submit on this matter. However, looking at the grounds of judgment of the learned judge, we are satisfied that his Lordship had considered the relevant factors by taking into account the position of the respondent and the injury caused by the libel to his reputation in assessing the proper damages to be awarded to him. The appellate court will not interfere with an award of damages unless the amount was unreasonable or exhorbitant because damages in libel action are at large (see Gatley on *Libel & Slander* (9th Ed) paras 36.25; 36.26).

[24] Based on the above reasons, we find no cause to interfere with the findings of the learned judge and therefore dismiss this appeal with costs and order that the deposit be given to the respondent towards the account of taxed costs.

Appeal dismissed.

Reported by Peter Ling